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No. 34.

IN THE

Supreme Court of the United States

October Term, 1936.

THE UNITED STATES OF AMERICA,
PETITIONER,

v.

RAYMOND WOOD,
RESPONDENT.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

BRIEF FOR RESPONDENT.

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IN THE

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OCTOBER TERM, 1936.

No. 34.

THE UNITED STATES OF AMERICA,
PETITIONER,
v.
RAYMOND WOOD,
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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

BRIEF FOR RESPONDENT.

Outline of Argument.

As over 75% of Government employees in the District of Columbia maintain legal or voting residences elsewhere they are in practice ineligible for jury service and so the argument based upon convenience has no great weight.

Even assuming that at common law Crown Servants could sit on criminal juries, this does not necessarily mean that a jury so composed constitutes an impartial

jury within the meaning of the Sixth Amendment. The reason for ruling out challenges for favor to Crown Servants, namely, that they were *supposed* to be favorable to the King, "because of their obedience" has no place in the American legal system, our political and legal structure being dominantly democratic not feudal or royalist in character. It seems extremely unlikely that the Colonists at the end of a successful rebellion against royal prerogative and misrule would wish to incorporate into their Constitution a discrimination in favor of the State in a criminal case.

This Court's decision in *Crawford v. U. S.*, 212 U. S. 183, does not, as applied to the present case, depend solely upon whether Crown Servants were qualified or disqualified at common law. The guarantee of the Sixth Amendment is not the guarantee merely of trial by jury as known at common law. This was already secured by Article 3, Section 2, Clause 3. The guarantee of the Sixth Amendment was the right to trial by an *impartial* jury. This Court's reasoning in *Crawford v. U. S., supra,* to the effect that where there is *interest* flowing from the relationship of employer and employee, bias or prejudice might creep in, is as sound today as when it was uttered. Further, this Court's argument in that case that a jury composed of few or many Government employees would not conduce to respect for, or belief in, the fairness of the system of trial by jury is equally true today, no matter what the common law was with respect to Crown Servants. The oath of this Court and its counsellors to support the Constitution of the United States requires the preservation not only of the right to an impartial jury under

the Sixth Amendment but the preservation of confidence in and respect for the institution of trial by jury, for once the public confidence in it vanishes the institution itself will be quick to follow.

The Government's contention that the Act does not destroy the right to challenge Government employees for actual bias or prejudice seems beside the point. Unless such employees can be challenged solely *because* they are Government employees the examination on the *voir dire* will result in an attempt to explore the juror's mind not on the basis of ascertained facts, but on the basis of imponderables far beyond the capacity of the average juror to take into consideration. As this Court said in *Crawford v. U. S.*, the juror might lean to the Government's side without realizing it. Asking a Government employee on the *voir dire* whether he thinks he can give the defendant a fair trial calls for a mere surmise as to his present and future feelings. As the present Statute constitutes the repeal of existing safe-guards it certainly leaves a defendant worse off than before, which means a diminution of his constitutional right. This should be enough.

I.

The Factual Background: Over 75% of Government Employees in the District of Columbia Have Voting Residences Elsewhere and Are Ineligible for Jury Service.

We do not quarrel with the Government's statistics indicating that 44.3% of all the eligible jurors in the District of Columbia are Government employees, (Gov.

Brief, p. 14), making it likely that from 5 to 6 Government employees will sit on every jury. We wish however to suggest that the Government fails to take into account the fact that a very large number of the Government employees in the District of Columbia maintain voting residences in their home States. This is particularly true at the present time when a determined effort is being made to "get out the vote" of all these Government employees living here but legally residing elsewhere. These persons are not eligible for service on juries in the District of Columbia, and in practice once the Jury Commission finds a Government employee has a legal residence elsewhere and votes there, it strikes his name off the jury list. The Jury Commission informs counsel herein that, from its experience, in excess of 75% of Government employees in the District of Columbia possess legal residences elsewhere, and are hence ineligible for jury service. From a practical viewpoint, therefore, the only good done by the present Act lies in rendering eligible for jury service the remaining small percentage of Government employees, a remainder, we suggest, which is steadily diminishing in proportion to their dawning realization that their best interests lie in their being "good citizens" and going home to vote.

It is only fair, of course, to admit that this argument works both ways. Whereas under the Government's statistics the number of Government employees on any given jury would *average* five or six (exactly the proportion in the present case), and so in some cases would run to ten or even twelve (a recent jury had twelve), under Respondent's data relative to absentee voting, the average on a jury would be only around three.

Further argument on the factual basis of the present Act seems unnecessary not only from this angle but also from the viewpoint that after all an argument based on the convenience of the Jury Commission (which is all the argument amounts to) is only entitled to be listened to up to a certain point. When it begins to impinge upon principle and essential human rights the argument from convenience must fall. It is the purpose of the present Brief to show that however convenient for the Jury Commission of this District to obtain large numbers of Government employees as jurors, such convenience should not outweigh the probability of weakening or destroying the traditional right to trial by an impartial jury under the Sixth Amendment.

II.

The Crown Servant Argument is Unsound.

This Court held squarely in *Crawford v. U. S.*, 212 U. S. 183, that at common law the relationship of master and servant operated as an absolute disqualification of a juror and constituted a principal cause of challenge. The Government now contends that while this was true generally, it was not true with respect to the King's Servants; that the servants of the king could sit on juries in criminal cases and could not be challenged in principal on the ground that they were the King's Servants. There seems some question as to whether they could be challenged even for favor under some of the authorities cited by the Government.

The following gives a rough analysis of the Government's authorities on the right to challenge a King's Servant:

Author:	Challenge In Principal	Challenge To Favor	Government's Brief Page
Fitzherbert	No	Yes	27-29
Chief Justice Brooke	No	No	29
Staunforde	No	Yes	30
Coke	No	No	30-31
Lord Hale	No	Yes	32
Chief Justice Rolle	No	Yes	32-33
Duncombe	No	No	34
Hawkins	Doubtful	Doubtful	35
Matthew Bacon	Doubtful	Doubtful	36
Viner	No	Yes	36
Hargrave	No	No	36-37
Chitty	Doubtful	Yes	37-38
The Cases:			
Year Book (1346) 19 Ass. 62, pl. 6	No	No	39
Year Book, 4 Henry VII 8, P. pl. 7	No	No	40
Year Book, 4 Henry VII, 3 H. pl. 5	No	No	40
Rex. v. Genney, (1508) Keilw. 102 a	No	No	42
Reg. v. Tutchin, 14 St. Tr. 1095, 1101, (1816)	Doubtful	No	42
Rex v. Hampden, (1683) 9 St. Tr., 1054, 1057-1061	No	Not decided	43-44
Rex v. Parkyns (1695) 13 St. Tr. 163	No	No	44
Rex v. Rowan (1793) 22 St. Tr. 1034, 1037-1039	No	No	45
Rex v. Kirwan, (1812) 31 St. Tr. 543	No	Not decided	45-46
King v. Edmonds, (1821) 4 B. & Ald. 471, 106 Eng. Rpt. 1009	No	No	46
Reg. v. Lacey, (1848) 3 Cox Cr. C. 517-519	No	Not decided	47-48

From the above it seems that nineteen authorities hold that these is no principal cause of challenge against a Crown Servant; that twelve authorities hold that there is not even any challenge for favor. Fitzherbert, (p. 29), Coke, (p. 31); and Rex v. Hampden, 9 St. Tr. 1054, 1057, 1061, (p. 43) allow challenges for favor in respect of menial servants. Actual malice as distinguished from favor was allowed as a challenge by: Staunforde, (p. 30); Lord Hale, (p. 32); Duncombe, (p. 34); Hawkins, (p. 35); Matthew Bacon, (p. 36); Year Book 19 Ass. 62 Pl. 639, (p. 39); Rex v. Genney, Keilw. 102 a, (p. 42); Reg. v. Blakeman, 175 Eng. Rpt. 479, (p. 42). Brooke allowed no challenge of any kind for the defendant but challenge of either kind for the king's side, (pp. 29-30).

The reasons why Crown Servants were not challengeable are given as follows:

Staunforde: "Because he should favor the King by reason of his obedience", (p. 28);

Coke: "Because in respect of his allegience he ought to favor the King more", (p. 31);

Duncombe: Same as Coke, (p. 34);

Rolle: "He ought to favor the King more by reason of his obedience", (p. 34);

Hawkins: "Because everyone is bound by his obedience to favor the King", (p. 35);

Bacon: Same as Hawkins, (p. 36).

Based on this alleged exception at common law the Government argues that if the common law concept of a jury trial connoted that Crown Servants could act as jurors, the Sixth Amendment guaranteeing an impartial jury meant no more than the English jury at

common law. We do not agree with this reasoning. If the Government takes this position it must affirmatively show that the Colonists recognized the exception in favor of the King's servants at the time the 6th Amendment was formulated. No authorities to this effect have been cited. Further, what constituted a jury trial at common law is only a partial guide to what was intended by the constitutional guarantee. The guarantee of the Sixth Amendment does not stop at guaranteeing a jury trial; this was already guaranteed by Article 3, Section 2, Clause 3 of the Constitution. The guarantee of the Sixth Amendment was that the accused should be entitled to trial by an *impartial* jury. The word "impartial" is entitled to some weight. At common law there was no such express guarantee. If the Government authorities are correct it might well be that at common law Crown Servants could not be challenged like other servants on the ground that they owed obedience to their master, and hence were disqualified in a case involving their master. The common law reasoning, from the Government's authorities, seems to be that, naturally, Crown Servants owed obedience to their master, the king, and that this was no ground for holding them disqualified. But this is not a declaration that juries thus composed were impartial juries within the meaning of the Sixth Amendment; it is simply a statement that, rightly or wrongly, common law juries in England could be composed of Crown Servants and a defendant must take them willy-nilly.

We do not believe that what existed with respect to jury trial at common law is the sole test of what constitutes an impartial jury within the meaning of

the Sixth Amendment. The Government has pointed to no substantial authorities in support of such a contention. *Continental Bank v. Rock Island Ry.*, 294 U. S. 648, 669, is cited as stating that the guarantee of trial by an impartial jury under the Sixth Amendment "has always been construed to mean a trial in the mode and according to the settled rules of the common law, including all the essential elements recognized in this country and England, when the Constitution was adopted." But the true meaning of this statement, and it is only dictum in the Continental Bank case, is that to live up to the constitutional guarantee the trial must have *at least* the elements of the particular form of trial at common law. There may be additional elements required, as in the present case, in accordance with the changed political structure of the United States. This certainly is no Government of paramount royal power. In addition, if the particular wording of this dictum is relied upon to support the elaborate argument based upon it, it should be pointed out that the trial must be in accordance with the "settled" rules of the common law. The Government's Brief herein shows that the rules at common law with reference to challenges of master and servant were anything but settled. Further, the dictum in the Continental Bank case is careful to say that the trial in question must possess all the essential elements "recognized in this country and England when the Constitution was adopted". No authority is pointed to by the Government showing that the alleged exception as to Crown Servants with respect to the master and servant disqualification was generally recognized in this country when the Constitution was adopted. Blackstone, cited by this Court in

the Crawford case as authority for holding that the relationship of master and servant operated as an absolute disqualification, makes no exception whatever with respect to Crown Servants. Nor do the other authorities submitted to this Court by counsel for the defendant in the Crawford case[1] contain any such distinction.

We think, therefore, the ancient authorities are not particularly helpful. It is not the dried up mummy of the common law, unearthed today by legal archaeologists, which is supposed to preserve in embalmment our liberties as set forth in the Bill of Rights. It is the living and breathing common law as known to the colonists. If so we know of no better guide than the authority of Blackstone, cited by this Court in the Crawford case. This Court in *Schick v. United States,* 195 U. S. 68 has stated that, for Constitutional construction, Blackstone's Commentaries are accepted as the most satisfactory exposition of the common law of England, the reason being that their wide circulation in the United States prior to the Revolution familiarized colonists with Blackstone's statement of the common law. It is logical, therefore, when we attempt to ascertain the meaning of common law terms in the Constitution to resort to the authority from whom the colonists had derived for the most part their knowledge of the common law. It would be a curious way to ascertain what these colonists intended in their references to

(1). These authorities were:
3 Bl. Com. 363;
1 Chitty, Crim. Law, 541; 542;
1 Bishop, New Crim. Proc., Sec. 902;
Block v. State, 100 Ind. 357;
Central R. Co. v. Mitchell, 63 Ga. 178;
Hubbard v. Rutledge, 57 Miss. 6;
Louisville N. O. & T. Co. v. Mask, 64 Miss. 738; 2 So. 360;
Pearce v. Quincy Min. Co., 149 Mich. 112, 112 N. W. 739

the common law to resort to authorities they had never heard of such as Year-Books published in Norman French centuries before, Latin abridgements, or little known commentators.

If, in spite of the evident importance of impartiality, the Government's authorities are correct and a defendant was compelled to take the King's Servants, good, bad or indifferent, and could not challenge them in principle because of their position, or even for favor as some of the authorities appear to hold, we can only say that the common law fell short of the desired ideal. This is no reason for our making the same mistake and restricting the phrase "impartial jury" in the Sixth Amendment to connote a jury which excludes those in relationship of master and servant so far as private parties are concerned, but compels us to take the King's Servants where the king is concerned. The practical result of the English doctrine applied in this country would be that a defense challenge based upon the relationship of master and servant would never exist at all in this country in criminal cases, all prosecutions in this country being undertaken not by a private party but by the public prosecutor.

It seems to us that the best clue to what the colonists meant by the impartial jury provided for in the Sixth Amendment is what constituted an impartial jury in their opinion at that time, and the best clue to this is Blackstone who makes no distinction in favor of the crown in excluding those who are master and servant. A moment's reflection will convince this Court of the unlikelihood that the American colonists, recently emerged from a civil war devoted to assailing the

royal prerogatives and privileges, would in framing a constitution desire to protect and reincorporate into their law one of the silliest and most baseless of all the so-called royal privileges, namely, the royal right, if the Government's authorities are correct, to have friends at court on any jury trying a criminal case. It is reasonable to suppose that had the colonists been aware of any such curious pretense of privilege on the part of the State there would have been a quick outcry. The silence of the records of the Constitutional Convention and other sources like the Federalist is an indication that the colonists did not intend to put the new American Government in any favored position in any struggle at law with its citizens. It seems, too, a curious approach to the problem of whether Government employees upon a jury constitute an impartial jury within the meaning of the Sixth Amendment to rely upon the practice of putting Crown Servants on criminal juries in England, which practice the Government's own authorities show was grounded upon the medieval English theory that it was somehow *lése-majesté*, even to hint that the loyalty of the Crown Servant to his king was something less than a form of slavery of mind and will. As the Government shows, the challenge that the "sheriff favored the king more than the party, * * * was held to be of no significance *for he should do so by reason of his obedience*", or "because every one is bound by his obedience to favor the king". (Government's Brief, pp. 28, 35. Italics ours.) It is a strange form of obedience to exalt the general allegiance of a Crown Servant to the king above his particular duty and oath to be fair in a judicial proceeding. It seems far removed from the enlightened type of fairness contemplated by the guarantee of

the Sixth Amendment of an impartial jury. If, in the Tudor times in question (referred to by Lecky as one of the darkest periods in English history, Lecky, Engl. 18th Cent., Vol. 3, 394-395), the struggle for human liberty had not gotten beyond the point at which it was considered not only not discreditable but in fact praiseworthy for a sheriff to pick a jury favorable to the king, "because he owed him his obedience", we can only quote this Court's remarks in *Hurtado v. California,* 110 U. S. 516, that it would be better "not to go too far back into antiquity for the best securities for our 'ancient liberties' ".

Exhaustive and interesting as the Government's investigation of the ancient authorities is on the practice of permitting Crown Servants to sit in criminal cases we think it a plowing of barren fields. Political and legal morality more or less keep pace with each other: Bacon, Raleigh and Pepys took bribes and no one apparently thought the worse of them, at least not until they began to be bribed "to excess". Similarly, the power and prestige of the English crown may have been so great that the King's Servants were supposed to be unfair, but not unfair "to excess".

The Government's argument in its Brief (Government's Brief, p. 18), that if we disqualify a Government employee who owes his livelihood to the Government we might as well disqualify a Federal Judge who is in the same position overlooks the fact that this is an imperfect world and we have to work with the human tools available and at our hands. We have

done the best we can with the Federal Judges by making them independent of removal for life. We cannot do the same for our jurors though we might like to. But we can do the next best thing, that is, we can take jurors who will have no temptation to be favorable instead of those who might or might not have inclinations the Government's way. The Government of the United States is a very large institution but sometimes it may appear to be a very soul-less institution, or a particular juror might think it so, which amounts to the same thing. Constitutional guarantees are formulated not for cases wherein anyone with any sense would realize they were unnecessary, but to be on the safe side—for the exceptional cases wherein without the guarantee in question injustice would be done. We know of no conclusive reason why a Government employee might not favor the Government, not necessarily from fear or hope of reward but imperceptibly, because of his mode of life and of thought. If there were any way to find out exactly how he stood we might say that the requirement of an impartial jury was not violated by taking him. But as will be shown in the present Brief in Point III in discussing the Crawford case wherein this Court considered this very point, no way exists on the *voir dire* to explore the juror's inclinations in favor of or against the Government. Any such exploration would seem to start with the presumption that he was at least slightly favorable to the Government because of his mode of life, settled habits of respect and because of his own and his children's bread. This ought to be enough.

III.

This Court's Decision in Crawford v. United States, 212 U. S. 183, Is as Good Law Today as It Was When It Was Decided.

We think it may be fairly charged that the Government has made no attempt to overcome the reasoning of *Crawford v. U. S.*, except upon the theory that this Court had misconceived the doctrine of the common law with reference to the King's Servants. The point is, however, that the decision of the Crawford case is only partly based on this ground. This Court and the attorneys on both sides of the present case have taken their oaths to "support and defend the Constitution of the United States", which includes the duty to preserve the right to trial by an impartial jury in all its traditional vigor. This Court's decision in the Crawford case represents an effort to preserve that right. Constitutional guarantees, this Court has frequently intimated, are to be guarded against erosion as well as against open assault. As late as *Patton v. U. S.*, 281 U. S. 276, (1930), this Court reiterated its faith in the American system of trial by an impartial jury. Its efforts to protect and preserve that trial need no justification based upon the common law. Independently of the common law this Court has power to hold that the trial of crimes in this country by a jury containing from one to twelve Government employees does not constitute trial by an impartial jury within the meaning of the Sixth Amendment. This is fairly inferable from the Crawford decision.

In *Crawford v. United States, supra,* Crawford was indicted and tried in the Supreme Court of the District

of Columbia for violation of the conspiracy statute. In the course of empaneling the jury one Haley was called as a juror and sworn upon his *voir dire*, and stated that he was a druggist *and did not know the defendant and had formed no opinion about the case;* that his drug store was a subpostal station, and that he was the clerk in charge and technically a clerk of the city subpostoffice; that he was paid $300.00 a year as compensation which included all clerical hire and rental of the premises and the entire service of taking charge of the sub-station; that this was one of the things in the drug business which could hardly be avoided, and that a drug store to keep up its prestige must sell postage stamps and might as well get paid for it as do it for nothing (pp. 192-193). Defendant thereupon challenged Haley for cause, the objection stated being that he was "a salaried officer of the Government." The challenge was overruled. During the organization of the jury the defendant exhausted his peremptory challenges and Haley sat as a member of the jury (p. 193).

It should be noted that exactly the same process was followed in the present case, except that the defendant challenged the Government employees and the pensioner twice, both prior to and after the exhaustion of the peremptory challenges. Further, the *form* of the challenge in the *Crawford* case, *i. e.*, that Haley was *a* salaried *officer* of the Government was less formal and precise than the challenges in the present case.

In ruling upon the question in the *Crawford* case this Court referred to Sections 215 and 217 of the District Code. Section 215 read then exactly as it does today; and Section 217 read exactly as it was prior to

the Act of August 22, 1935, which now constitutes the second paragraph of Section 217 and purports to render qualified Government employees. The Court adverted to the Government's contention that, under Section 217, Haley was not "an officer of the Government" and stated that the objection to the juror was evidently by reason of his relations to the Government, however described (p. 194). The Court held that the general character of the objection to the juror was fairly before the court, and that the question of the qualifications of a juror in the District of Columbia was an important one. The Court said:

> "It is of special importance in this District, where there are so many thousands of clerks and employees of the government, to know whether they are qualified jurors * * * to sit on the trial of cases to which the government is a party. If they be so qualified it might not be cause for much astonishment to see in this District a majority of a jury composed of such jurors.
>
> "Taking the contention of the government to be sound, the fact that a proposed juror is a salaried officer of the government can only be ground for his own claim of exemption, which, if not made by him, leaves him a competent juror. A jury composed of government employees *where the government was a party to the case on trial would not in the least conduce to respect for, or belief in, the fairness of the system of trial by jury.* To maintain that system in the respect and affection of the citizens of this country it is requisite that the jurors chosen should not only in fact be fair and impartial, *but that they should not occupy such relation to either side as to lead, on that account, to any doubt on that subject.* We do not think that Sec. 215 of the Code of the District includes the whole subject of the qualifications of jurors in that District. If that section, together with Sec. 217, were alone to be considered, it might be that the juror was qualified. But by the common law, a

further qualification exists. If that law remains in force in this regard in this District a different decision is called for from that made in this case. The common law in force in Maryland, February 27, 1801, remains in force here, except as the same may be inconsistent with or replaced by some provision of the Code for the District. Code, chap. 1, Sec. 1, p. 5. It has not been contended that the common law upon the subject of jurors was not in force in Maryland at the above-named date, or that it did not remain in force here, at least up to the time of the passage of the Code. Jurors must at least have the qualifications mentioned in Sec. 215, but that section does not, in our opinion, so far alter *the common law* upon the subject as to exclude its rule that one is not a competent juror in a case if he is master, servant, steward, counselor, or attorney of either party. In such a case a juror may be challenged for principal cause as an absolute disqualification of the juror. 3 Cooley's Bl. Com. 4th ed. p. 363; Block v. State, 100 Ind. 357, 362." (pp. 195-196; Italics ours.)

The Court then refers to the dissenting opinion of Mr. Chief Justice Shepard of this Court wherein various civil cases were cited to the effect that a clerk or employee of a private party was not competent to sit on a civil jury involving the employer's case. The Court then says:

"Although the cases cited were civil cases and rest mainly on the common law, they are not lessened in weight on that account. On the contrary, they apply with added weight to criminal cases. Modern methods of doing business and modern complications resulting therefrom *have not wrought any change in human nature itself,* and therefore have not lessened or altered the general tendency among men, *recognized by the common law,* to look somewhat more favorably, *though perhaps frequently unconsciously,* upon the side of the person or corporation that employs them, rather than upon the other side. *Bias or prejudice is such an elusive*

condition of the mind, that it is most difficult, if not impossible, to always recognize its existence, and *it might exist in the mind of one* (on account of his relations with one of the parties) *who was quite positive that he had no bias, and said that he was perfectly able to decide the question wholly uninfluenced by anything but the evidence.* The law therefore most wisely says that, with regard to some of the relations which may exist between the juror and one of the parties, *bias is implied,* and *evidence of its actual existence need not be given.* "The position of the juror in this case is a good instance of the wisdom of the rule. His position was that of an employee who received a salary from the United States, and his employment was valuable to him, not so much for the salary as for the prospect such employment held out for an increase in his business from the people who might at first come to his store for the purchase of stamps, etc. It need not be assumed that any *cessation* of that employment *would actually follow* a verdict against the government. It is enough that it *might possibly be the case;* and the juror ought not to be permitted to occupy a position of that nature to the possible injury of a defendant on trial, *even though he should swear* he would *not be influenced* by his relations to one of the parties to the suit in giving a verdict. It was error to overrule the defendant's challenge to the juror." (pp. 196-197; Italics ours.)

We emphasize this Court's remark above quoted:

"A jury composed of government employees *where the government was a party to the case on trial would not in the least conduce to respect for or belief in, the fairness of the system of trial by jury.* To maintain that system in the respect and affection of the citizens of this country it is requisite that the jurors chosen should not only in fact be fair and impartial, *but that they should not occupy such relation to either side as to lead, on that account, to any doubt on that subject."* (Italics ours.)

This statement is as true today as it was when it was uttered. A jury containing from one to twelve Government employees would always, we feel, be suspect. In *Patton v. U. S.*, 281 U. S. 276, 312, this Court stated that the right of the accused to a trial by a constitutional jury must "be jealously preserved", and the maintenance of the jury as a fact finding body was stated to be "of much importance in our traditions". Any diminution of the respect due that institution is akin to a diminution of the constitutional right itself by lessening the prestige of the body resorted to. (1)

The decision of this Court in the Crawford case was followed in *U. S. v. Griffith*, 55 App. D. C., 123, wherein the Court of Appeals affirmed the lower Court which held strongly that a Government employee receiving disability compensation was ineligible for jury service. The Court said:

> "Can it be seriously contended that the juror named had freedom of mind; or that he stood indifferent as he stood unsworn; or that his membership on the panel *was favorable to an impartial jury*", (Rec. in *U. S. v. Griffith*, No. 4114, October Term, 1924, Court of Appeals, D. C.).

To the same effect is *Miller v. U. S.*, 38 App. D. C., 361. Cases applying and approving the decisions above referred to are *Bickell v. State*, (Okl.), 270 Pac. 88, 89, wherein a depositor of a failed bank was held disqualified as a juror upon a trial of the defendant for violating the State laws in the conduct of the said bank; *Lockhart v. State*, 145 Md. 502, 125 A. 829, involving a

(1). Blackstone's remark (quoted by Justice Storey) is interesting. Discussing the reason for peremptory challenges he speaks of "how necessary it is that a prisoner (when put to defend his life) should have a good opinion of his jury, the want of which might totally disconcert him". (4 Black. Com., 353, quoted with approval in U. S. v. Marchant, 4 Mason, 160, 162; Lewis v. U. S., 146 U. S. 370). One would think that seeing twelve Government employees in the box would be sufficiently disconcerting.

juror who was the office manager for an employer who was a creditor of the defendant's firm; and *State v. Dushman,* (W. Va.), 91 S. E. 809, 810, wherein the employee of a railroad was held disqualified as a juror on a trial for one indicted for larceny from the railroad.

From the above it appears that the Courts in *Crawford v. U. S., supra,* and in *U. S. v. Griffith, supra,* and other cases, have held that persons more remotely indebted to the United States for their livelihood than the three jurors complained of in the present case are ineligible for jury service. In *Crawford v. U. S., supra,* this Court based its decision not upon the ground that the juror in question favored the United States *in fact.* On his examination on the *voir dire* the juror in question stated under oath that he did not know the defendant and had formed no opinion about the case. The basis of this Court's decision was not that the juror was or would be biased or prejudiced in fact, but that by reason of his obligation to the United States he might subconsciously lean toward the side of the United States without realizing it. As the Court says in the Crawford case:

> "Bias or prejudice is such an elusive condition of the mind that it is most difficult, if not impossible, to always recognize its existence, and it might exist *in the mind* of one (on account of his relations with one of the parties) who was *quite positive* that *he had no bias,* and said that he was perfectly able to decide the question wholly uninfluenced by anything but the evidence. The law, therefore, most wisely says that, with regard to some of the relations which may exist between the juror and one of the parties, bias is implied, and evidence of its actual existence need not be given." *(Crawford v. U. S.,* pp. 196-197. Italics ours.)

The Court then goes on to say that it need not be assumed that any harm would come to the juror if he should join in a verdict against the Government. The test is that it might *possibly* be the case, and that the juror ought not to be permitted to occupy the position of that nature to the possible injury of a defendant on trial "even though he should swear he would not be influenced by his relations to one of the parties to the suit in giving a verdict." *(Crawford v. U. S.*, p. 197.)

To the same effect is Mr. Justice Shepard's statement in his dissenting Opinion in *Crawford v. U. S.*, 30 App. D. C., 1, 32, cited with approval by this Court in *Crawford v. U. S., supra:*

> "It does not matter that he had the self-confidence to swear that he could try the cause impartially. *It was not for him to determine his competency on that point.* When the fact was developed that he was in the employment of appellant the *law adjudged him incompetent.* The law does not lead jurors into the temptations of a position where they may secure advantage to themselves by doing wrong, nor permit the possibility of the wavering balance being shaken by self-interest." (30 App. D. C., p. 33. Italics ours.)

It follows from the above that the basis of the *Crawford* decision is not in the *fact* of the juror's bias or lack of bias, or what the juror thinks is the fact. The Court says that the juror is an entirely unreliable witness, because he may be prejudiced without knowing it. Therefore, the Court states that the law excludes him as a juror because he must not be permitted to occupy a position to the possible injury of a defendant no matter how he may surmise his own state of mind. In brief, this Court holds that a juror in the employ of one of the parties is not eligible material from which to build up an *impartial jury.*

IV.

The Government's Argument that the Present Act Does Not Prevent Challenging Government Employees for Cause. (Gov. Brief, pp. 16-17.)

This is simply a truism. Anyone knows that the Act does not prevent challenging a Government employee for extrinsic cause. It simply prevents challenging a Government employee on the ground that *he is a Government employee.* Even at first glance it would seem that the destruction of this challenge is a diminution of the defendant's rights. Prior to the passage of the present Act Government employees could be filtered out by a defendant's challenges. The Government now contends that they cannot be or should not be, but that the defendant can still challenge them "for cause," such as that he was an employee of the prosecuting branch of the Government. (Gov. Brief, p. 16.)

It is noticeable that the Government does not inform us as to how this right is to be exercised. We ask this Court to visualize how a defendant is to go about doing it. The prospective juror takes his place in the box; the attorney for the defendant asks him in what branch of the Government he is employed. He answers "I am employed in the Department of Justice." The Government in its present Brief would lead us to believe that upon this answer counsel for defendant could say, "I challenge you for cause." But a newly admitted Assistant United States Attorney would promptly respond, "There is nothing before this Court to show that the present juror could not give the defendant a fair trial. The mere fact that he is employed in the

Department of Justice does not, in the face of this statute, show that he is biased or prejudiced."(1) The Court would promptly sustain the Government and would require the defendant's counsel to ask the prospective juror if he felt that his employment in the Department of Justice would prevent his giving the defendant a fair trial. At this stage all of the arguments which led this Court in *Crawford v. United States*, to hold Government employees *per se* disqualified come into play. The juror's response that his employment in the Department of Justice would not prevent his giving the defendant a fair trial is entitled to no credibility. He is simply giving a surmise as to what he *thinks* his feelings are going to be in the course of a trial—a surmise not based upon a fact as in the case of a previous casual acquaintance with an attorney on either side of the case but a surmise based upon imponderables which may become strong or weak dependent upon the course of the trial, the evidence adduced, and all sorts of matters, of which the juror has no knowledge whatsoever at the time he makes his reply. Further, the Government's easy solution of this situation would have been an equally easy solution of this Court's problems in the *Crawford* case. This Court could readily have said that the *Crawford* juror was not shown to be biased or prejudiced by the mere fact that he was operating a postal substation. But it was significant that this Court did not wish to go into the complicated question of the juror's prognostications as to his future state of mind. It felt that the matter was too risky; that there was too much of a chance that the juror would be likely to be prejudiced; that there was too little assurance of his lack of susceptibility to

(1) See Reynolds v. U. S., 98 U. S. 145.

those human impulses, influences and motives which impinge upon every person however fair that person may desire to be.

One further word may be said with respect to the Government's argument (Brief, p. 17) that the present case illustrates the unlikelihood of bias on the part of a juror in Government employ and that any contention that Government employees feel a special interest in seeing the United States win the case "ignores the realities of the situation." The point is we don't know what the realities of the situation are. The realities of the situation are locked up in the minds and hearts of the prospective jurors. It is what they feel or may feel at the commencement of the trial or later which constitutes the realities of the situation. These feelings we have no way to explore short of the question "Do you think you can give the defendant a fair trial?", which settles at once everything and nothing. If such a question is to be asked of Government employees it can logically be asked of any person. Why not draw an Assistant United States Attorney and ask him the question? If the Government responds as it seems to in the present Brief that such a person's answer is not entitled to be considered, we say this constitutes a concession that the Governmental method of achieving a fair jury is ineffective. Or conversely, the Government must admit that there are certain relationships as to which bias or prejudice must be presumed. The Government's argument, therefore, is one based upon degree, but this degree is determined at haphazard. If the test question is good in one case it is good in all; there can never be any more certainty *in*

a particular case that a Government employee who says he can give the defendant a fair trial is more likely to give him a fair trial than an Assistant United States Attorney who makes the same response.

We think the Government concedes itself out of Court when it argues that under the present Statute a challenge for cause still exists with respect to a Government employee who is employed in the prosecuting branch of the Government. Laws tending to diminish constitutional guarantees concerned with human rights should deal with moral certainties, clear beyond misgiving. The present law is in no such classification. Government employees are not and cannot be beyond the imputation of interest on the side of the Government. If the so-called test question amounts to nothing and would if applied allow anyone and everyone to serve upon a jury provided that he answered that he could give the defendant a fair trial we think that only the doctrine of the *Crawford* case affords any protection to a defendant. Government employees must be eliminated as prospective jurors on the common sense theory of "safety first."

V.

The present legislation renders qualified as jurors in a criminal case persons who have always been disqualified even in civil damage suits.

The revolutionary character of the present statute will be appreciated when it is considered that it renders qualified and unchallengeable as jurors in a criminal case persons who have never been considered quali-

fied and who have always been considered challengeable for cause in civil cases of little importance. This too goes back to the common law for Blackstone states on this subject that in criminal cases challenges may be made "for the very same reasons that they may be made in civil causes" (4 Black. Com. 352).

The Supreme Court of the United States has already cited with approval Mr. Justice Shepard's dissenting opinion in *Crawford v. U. S.*, in this Court *(Crawford v. U. S.*, 30 App. D. C. 1, 32), wherein, after citing Blackstone (3 Black. Com. 363, *supra)*, Thompson and M. Juries, p. 176, he cites a long line of civil cases holding that the relationship of employer and employee worked an absolute disqualification.

In *Central Ry. Co. v. Mitchell*, 63 Ga. 173, 180, the Court stated:

> "It is almost impossible, however incorruptible one may be, not to bend before the weight of interest; and the power of the employer is that of him who clothes and feeds over him who is fed and clothed. Hence the *common law excluded all servants.*" (Italics ours.)

In *Temples v. Georgia Ry. Co.*, 82 S. E. 777, 779 (Ga.), the Court states, with reference to a relative sitting upon the jury that upon the general experience and observation of which the Court has knowledge, *as a matter of law* the juror is incompetent. The rule of law which excludes the juror is that once interest, direct or indirect, is shown the Court will take judicial knowledge of the fact that in all human probability a juror will act in accordance with his interest. The Court says:

> "When, according to universal human experience, the inherent probabilities of the circumstances by which the juror is environed and to the influence of which he is to be subjected compel the conclusion, in accord with the court's judicial knowledge, that the juror will *naturally be affected by his interest*, it cannot be held, as a matter of law, that the juror will contribute to or is qualified to sit in an *impartial trial* as guaranteed by the Constitution." (Griffith Record, p. 24. Italics ours.)

The Court points out that the disqualification of a relative of a party is based not upon the *actuality* of interest but upon the *probability* of its existence because as a matter of fact many men feel but little interest in their relatives, and in the same way many employees feel little interest in their employers. However, the Court says:

> "Always the highest test is self-interest, and where that appears it provides an *absolute* bar to qualification for service on the jury." (Italics ours.)

The desire for impartiality of jurors even in civil cases is so great that the rule is stated as follows:

> "In general the authorities hold that a very *insignificant* interest in the result of an action, and frequently a very *trifling relationship* to one of the parties, is sufficient to disqualify a person from sitting as a juror (16 Ruling Case Law, p. 273)." (Italics ours.)

In addition to the disqualifications referred to above the following have been held ground for disqualification of a juror or, as otherwise stated, a challenge for cause:

> Employee of a corporation in an action against it *(Hufnagle v. Delaware etc., Co.*, 76 Atl. 205 (Pa.), 40 L. R. A. N. S. 978, *O'Brien v. General Accident Co.*, 42 F. (2d) 50);

Attorney and client (*Jones v. Ford*, 134 N. W. 569 (Ia.), 38 L. R. A. N. S. 777);

Master and servant (*Co. Litt.*, 1576; *3 Black. Com.*, 363; *Tidd's Prac.* (4th Amer. Ed. 853));

Servants of lessee who are also servants of lessor (*Georgia Ry. Co. v. Tice*, 50 S. E. 916 (Ga.));

Landlord and tenant, at common law (*5 Bacon's Abridgement*, 352; *Co. Litt.*, 158 A. 157 B);

Stockholder (*Stone v. Monticello Construction Co.*, 40 L. R. A. N. S. 978, note);

Relatives of stockholders in a corporation (*Walter v. Louisville Ry. Co.*, 150 S. W. 824 (Ky.) 42 L. R. A. N. S. 126);

Cases of contractual relationship (*Quay v. Duluth Ry. Co.*, 116 N. W. 1001, 18 L. R. A. N. S. 250);

One interested in an indemnity company which would have to pay the judgment (*See note L. R. A.* 1915 A, 154 *et seq.*).

As in the civil cases above enumerated prospective jurors in the particular classes are disqualified and may be challenged for cause on the revelation of their status without further enquiry it would seem that the rule should be still more strict in respect of jurors in criminal cases. It is interesting to note that in most, if not all, the cases above given the reason for the rule is not that the juror is in fact prejudiced, but the likelihood that in some contingency of the case he might become prejudiced. The fact that the juror might say on oath that he would not be prejudiced is taken of as

little account, the Court rightly concluding that his testimony on this point being more or less of a prediction is not entitled to be deemed conclusive, and hence in fairness to the other side the interested juror must be excluded.

VI.

The Government's Argument that Aside From The Common Law the Act Does Not Impair the Essential Element of Trial by an Impartial Jury. (Government's Brief, pp. 59-74.)

On this point, the Government argues that this Court intimated in the *Crawford* case that the common law rule could be modified by statute in the various States. This is perfectly true, so far as the Federal Government is concerned. The States can make anything they want Due Process in criminal cases, within obvious limitations. *(Ashe v. U. S.*, 270 U. S. 424.) The States, therefore, can alter the common law qualifications of jurors, assuming their own Constitutions do not forbid it, or could abolish trial by jury entirely if they wanted to. *(Snyder v. Masse*, 291 U. S. 97.) It is well known that the first six Amendments to the Constitution are limitations only upon the Federal Government, not upon the States. But so far as the United States is concerned, we do not think *Crawford v. U. S., supra*, is authority that the Federal Government can abolish the common law qualifications for jurors in respect of interest flowing from the relationship of master and servant. The question was not before the Court, and the Opinion contains no discussion of the question.

Walker v. New Mexico and Southern Pacific R. Co., 165 U. S. 593, 596, to the effect that the aim of the

Seventh Amendment "is not to preserve mere matters of form and procedure but substance of right" is in line with respondent's argument herein, which is devoted entirely to the contention that the present Statute is a substantial diminution of the Constitutional guarantee of an impartial jury. The present Statute in no way involves any matters of form. Nor do we differ with the statements quoted by the Government from *Ex parte Peterson,* 253 U. S. 300, 309, 310, that the Seventh Amendment does not prohibit changes in the jury system. It is not that the present Statute has "changed" trial by jury, but has changed it for the worse; this is respondent's argument. The Government's further argument that various changes in the jury system, such as the reduction of peremptory challenges; the change of the common law privilege with respect to the number of challenges where there are joint defendants; the fact that a juror who has formed an opinion may still act under certain conditions; that women may serve as jurors; that the examination on the *voir dire* may now be conducted by the Judge, and finally, that the common law jury *de medietate linguae* has been abolished, is not persuasive in the present case. The changes above referred to do not involve the essential feature of the jury system, which is impartiality. None of these changes tend to make it *less likely* that an impartial jury will be obtained. As to the cases in the various States holding that State employees are not disqualified from acting as jurors it is noticeable that many of them were decided subsequent to this Court's decision in the *Crawford* case in 1908. This being so they simply represent a difference of opinion between the Legislatures and the Courts of the States and this Court. It is hardly an argument that

this Court is wrong simply because State Courts disagree with it; the point is the *reasons* back of the disagreement. On this question we are content with this Court's reasoning in the *Crawford* case.

We think also that to be reasonable, any statute changing the common law with reference to the disqualification of one in the relationship of master and servant should work both ways. In other words, if a Statute destroys a defendant's right to challenge a servant of the Government, as the present Statute does, the Government's right to challenge a servant of the defendant should likewise be destroyed. This, however, is not the fact. The present Statute removes the one but preserves the other, and thus possibly is in violation not only of the Sixth Amendment but of the Fifth as constituting an unreasonable discrimination or classification.

We make one final suggestion. In "The Business of the Supreme Court" by Professors Frankfurter and Landis[1] the authors advert to this Court's approval in *Muller v. Oregon*, 208 U. S. 412, 419-421, of the method of inquiring into the reasonableness of legislation by considering the facts upon which such legislation is based,[2] a method seemingly adopted by the Government in its present Brief in dealing with "The Factual Background" of the Act herein, (Gov. Brief, pp. 9-19). The authors go on to say:

> "One thing is clear. The legal profession has not yet put its mind to devising the necessary method and machinery by which knowledge of

(1). P. 313-314.
(2). Followed in Bunting v. Oregon, 243 U. S. 426; Stettler v. O'Hara, 243 U. S. 629; Adkins v. Children's Hospital, 261 U. S. 525. Compare also People v. Schweinler Press, 214 N. Y. 395.

those facts, which are the foundation of constitutional judgment, may be formally put at the service of courts." (Frankfurter & Landis, "The Business of the Supreme Court", p. 315.)

We make our own contribution to the solution of this problem, which is to appeal, on a question of the Constitutionality of legislation altering legal procedure, to the experience of the members of this Court. Every one of the nine Justices on this Court has probably at one time or other in his professional career represented a defendant in a criminal case or a plaintiff in a civil suit at law against the Government or the State. We ask each member of this Court, searching his memory and considering his past experience, to say frankly whether in such a case and with such a client he would not, with three peremptory challenges left, automatically challenge every Government employee remaining on the jury. If so, we say the deep-rooted misgiving so evidenced proves the point we have perhaps gropingly attempted to set forth: that no one will ever be satisfied as to the complete fairness of a jury of his adversary's employees. In this situation it is reasonable to foresee an interference with the exercise of the right of peremptory challenges, which if the present Statute be held constitutional, will from now on be diverted from their traditional use[1] and devoted exclusively to the paramount problem of how to keep Government employees off the jury. We suggest this appeal goes far to answer the problem of the present case.

(1). I. e., a "free" challenge, not necessarily based upon a definite reason; see 4 Black. Com. 353; also U. S. v. Marchant, 4 Mason, 160, 162; Lewis v. U. S., 146 U. S. 370.

Conclusion.

The judgment below should be affirmed.

Respectfully submitted,

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